IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

DISNEY V. DOUGLAS COUNTY

JAMES DISNEY, APPELLEE,
V.
DOUGLAS COUNTY, NEBRASKA, APPELLANT, AND DOUGLAS COUNTY, NEBRASKA, DEPARTMENT OF CORRECTIONS ET AL., APPELLEES.

Filed March 27, 2012. No. A-11-513.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Donald W. Kleine, Douglas County Attorney, and Timothy K. Dolan for appellant.

Gregory R. Coffey, of Friedman Law Offices, for appellee James Disney.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

The appellee, James Disney, was injured when he fell on a ramp inside the Douglas County Department of Corrections. Following a bench trial, the district court determined that Douglas County was negligent and liable for a portion of Disney's injuries and entered a judgment for Disney. Douglas County appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Because the district court was not clearly wrong in finding that Douglas County's negligence was the proximate cause of Disney's fall and resulting injuries, we affirm.

BACKGROUND

The accident in this case occurred on June 7, 2006. At the time of the accident, Disney was the sheriff of Webster County, Nebraska, a position he had held for 34 years. In his capacity as sheriff, Disney was retrieving an inmate, Leslie Wulf, housed at the Douglas County

Department of Corrections (correctional facility) in Omaha, Nebraska, for the purpose of transporting him to appear in court in Webster County. Disney slipped and fell as he was walking down a ramp to meet Wulf. Disney sustained injuries as a result of the fall.

In Disney's operative complaint against Douglas County, filed pursuant to the Political Subdivisions Tort Claims Act, he alleged that his slip and fall was the proximate result of Douglas County's negligence. Douglas County filed an answer, denying Disney's allegations of negligence and alleging that Disney was contributorily negligent and that he assumed the risk of his injury. Trial was held on January 24, 2011. We will summarize the evidence received at trial as it relates to the issues of negligence, contributory negligence, and assumption of the risk, as those are the issues on appeal. We need not address the evidence concerning Disney's injuries and damages, as there are no errors assigned in this appeal related to those issues.

Disney notified the correctional facility in advance as to the date and approximate time that he was going to pick up Wulf. On the day in question, Disney arrived at the correctional facility at approximately 1:30 p.m. After passing through the secured door into the bullpen area, Disney eventually proceeded up the ramp into the transfer office. When Disney arrived at the transfer office, Wulf still needed to be retrieved from the interior area of the jail. Disney testified that it took at least a half hour for Wulf to be brought to the transfer office area. During that time, Disney sat in a chair in the transfer office facing a window looking into the bullpen. While Disney waited, two female inmate trustees began mopping the bullpen area and ramp, which activity Disney could see from his location in the transfer office. The floor of the bullpen, ramp, and transfer office area was entirely composed of a linoleum tile material. The ramp is approximately 8 feet in length.

When Wulf was finally brought to the bullpen area, the trustees were standing on the landing at the top of the ramp. Wulf testified that the trustees had finished mopping and had been standing there for approximately 10 minutes before Wulf was brought in.

Disney testified that he was aware that mopping might leave a floor wet, that drying times may vary, and that wet tile can be slippery.

Although he recognized that the floor had recently been mopped, Disney testified that he thought he was being reasonably careful and that the floor looked dry as he began walking down the ramp toward the bullpen. He did not see any wet floor signs in the area. Further, Disney was unaware of any way to secure Wulf other than to walk directly down the ramp and into the bullpen. The area was well lit with angled handrails on both sides of the ramp, and Disney could see where he was going. Disney was required to bring his own restraint devices, handcuffs, and leg irons with which to transport Wulf, and as he proceeded down the ramp, his hands were full with these items as well as some papers, and thus, he did not use the handrails. Disney was wearing shoes with deep grooves in thick rubber soles.

Just before Disney reached the bottom of the ramp, his feet slipped out from underneath him and he fell onto his back. The next thing Disney remembered was standing up back at the top of the ramp by the transfer office. Correctional facility employees had Disney sit in a chair between 5 and 20 minutes to regain his composure and to see if he was injured.

After recovering, Disney returned down the ramp to secure Wulf. Disney testified that from this vantage point at the bottom of the ramp, he turned around and could see "little pools of

water and it looked like [the] linoleum tile . . . had been recently waxed." Disney did not see any water before he walked down the ramp.

There was evidence presented that Wulf also slipped when he was brought into the bullpen area. Disney admitted that he saw Wulf "[do] his little maneuver" and almost fall to the floor, but that the escorts were holding onto him. Disney testified that Wulf likes to "clown around" and that is what Disney thought Wulf was doing at the time. Disney did not realize that Wulf slipped because of the wet floor.

Correctional officer Sammie Jackson witnessed Disney's fall, and his deposition was read into evidence. Jackson was responsible for the movement and transfer of Wulf from the interior of the correctional facility to the transfer area. Jackson did not recall Wulf's slipping or any unusual footwork while he was being transferred. Jackson testified that he did not recall seeing any wet floor signs placed in the area. Jackson had no trouble navigating the ramp himself, and he did not know whether the floor was wet or waxed. Jackson stated that Wulf did not have trouble walking down the ramp. Jackson did not hear the transfer officer give any warning to Disney before he walked down the ramp. Jackson testified that Disney was halfway down the ramp when he saw Disney slip.

Jackson also testified regarding the duties of the transfer officer who had the responsibility for supervising the trustees who did the mopping. Jackson testified that the transfer officer on duty would have had the authority and discretion as to whether or not the trustees needed to mop the transfer office area at that time. There is no set routine or schedule for when inmate trustees are to clean various areas of the jail. There are policies and procedures in place regarding the training and supervising of inmate trustees as well as instructions on how mopping should be performed, but Jackson testified that there is generally no hands-on training from correctional facility staff. The post orders for the transfer office require the transfer officer to supervise inmate trustees when cleaning the transfer area, including "making certain that the 'wet floor' signs are appropriately placed." A safety and sanitation order issued by the correctional facility reiterated the requirement of placing "hazard wet floor" signs at the starting and ending points of areas to be mopped, and further instructed that "when mopping areas of heavy foot traffic, mop one side of the floor, and then the other (this way one side is near dry prior to mopping the other side.)"

Correctional officer Matthew Denker was the transfer officer on duty on June 7, 2006, and was present when Disney fell. Denker's deposition was entered into evidence. Denker did not specifically call for the trustees to mop the transfer area at the specific time that Disney was there, but another officer "used his best judgment" for them to clean during a "down time." Denker did not believe that the correctional facility had been notified of the specific time Disney was scheduled to pick up Wulf because Disney was required to wait for a long period of time.

Denker testified that the trustees usually mop one side of the floor at a time to keep the other side dry. He also testified that at the time Disney fell, the left side of the floor was wet, but the right side was dry. Denker testified that he warned Disney twice to be careful about the floor being slippery because it had just been mopped; however, Denker did not mention any such warnings in his written report prepared after the accident. Denker testified that he thought the wet floor signs had been placed. Denker stated that if Disney had asked to use another route to

leave, the request would have been denied as a matter of routine procedure; however, Disney did not ask to use another route.

On May 19, 2011, the district court entered an order finding that Douglas County's negligence was the proximate cause of Disney's fall and resulting injuries and damages. In connection with the county's negligence, the district court made factual findings that the inmates mopping the ramp area failed to place the required "hazard wet floor" signs in the area and mopped the entire surface of the ramp instead of one side at a time. The court further found that Disney's economic damages totaled $27,735.42 and that his noneconomic damages totaled $125,000. Finally, the district court found that the percentage of Douglas County's negligence was 55 percent and that Disney's percentage of negligence was 45 percent.

ASSIGNMENT OF ERROR

Douglas County assigns, restated, that the district court erred in (1) concluding that Douglas County owed Disney a duty, (2) finding that Disney proved the elements of premises liability, (3) failing to find for Douglas County under an assumption of risk theory, and (4) assigning its apportionment of negligence.

STANDARD OF REVIEW

In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong. *Downey v. Western Comm. College Area*, 282 Neb. 970, ___ N.W.2d ___ (2012). When determining the sufficiency of the evidence to sustain the trial court's judgment, an appellate court must consider the evidence in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and the successful party is entitled to the benefit of every inference that can be deduced from the evidence. *Id.*

ANALYSIS

Duty.

Douglas County first argues that the district court erred in concluding that it owed Disney a duty, because Disney possessed the same information that Douglas County's employees had and that the condition was open and obvious.

Initially, we note that the district court did not separately analyze the elements of negligence and did not make a specific finding relative to the element of duty, although such was implicit in its finding that the county was negligent. Nevertheless, we reject this argument by Douglas County because established Nebraska law provides that the rule in open and obvious cases is no longer that there is "no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover them and to be able to protect himself" as stated in *Crawford v. Soennichsen*, 175 Neb. 87, 92, 120 N.W.2d 578, 581 (1963), and as argued by the county. *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982) (expanded potential for finding duty owed by possessors to invitees in area of known or obvious dangers). See, also, *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988).

Premises Liability.

This case is properly analyzed under the law of premises liability as set forth by the Nebraska Supreme Court in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), and *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004). Owners and occupiers of land have a duty to exercise reasonable care in the maintenance of their premises for protection of lawful visitors. *Heins, supra*. The owner or occupier is subject to liability if the lawful visitor proves:

> (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

Aguallo v. City of Scottsbluff, 267 Neb. at 807, 678 N.W.2d at 89. See, also, *Downey v. Western Comm. College Area*, 282 Neb. 970, ___ N.W.2d ___ (2012); *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

Douglas County argues that Disney failed to meet his burden of proving the elements necessary to establish premises liability. Specifically, Douglas County argues that Disney did not establish elements (3) and (4); namely, that Douglas County had reason to expect Disney would not discover the danger posed by a recently mopped, sloping tile floor or would fail to protect himself against said danger and that Douglas County failed to use reasonable care to protect Disney against the danger.

Reason to Expect That Disney Would Not Discover Danger or Fail to Protect Himself.

The Nebraska Supreme Court has adopted the Restatement (Second) of Torts § 343A (1965), which states: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Accord *Downey, supra*.

Douglas County argues that Disney observed the inmate trustees mopping the sloped, tiled ramp area; that he knew of and fully appreciated the freshly mopped condition of the tile floor; that he knew that freshly mopped tile floors could still be wet and slippery; and that he knew that drying time can vary. Further, Douglas County argues that the continued presence of the inmate trustees should have reminded Disney that they had recently completed mopping and eliminated the need for specific wet floor signs. Douglas County also argues that Disney observed Wulf slip and nearly fall when he stepped onto the flat tile area immediately outside the office. Finally, Douglas County argues that it had no reason to expect that Disney would not protect himself from the risk of slipping because his knowledge of the risk was equal to Douglas County's employees' awareness, lighting in the area was adequate, and he had observed the presence of the handrails on either side of the sloping floor.

The evidence supports the district court's findings that the inmates failed to place the required "hazard wet floor" signs in the area that had been mopped. This was contrary to the county's written policies. Further, Disney testified that the mopping activity had been completed 10 minutes before Wulf was brought into the bullpen area and that the ramp appeared to Disney to be dry when he began his descent. Disney testified that he was carrying his equipment as he began to walk down the ramp and that he was being reasonably careful as he proceeded toward the bullpen. It was not until Disney's second trip down the ramp after his fall that he observed some water at the bottom of the ramp, which he indicated was not visible from the top of the ramp. There was no way apparent to Disney for getting from the transfer office to Wulf other than walking down the ramp.

Viewing the evidence in the light most favorable to Disney and resolving the controverted facts in his favor, including the inferences that can be deduced from the evidence, we cannot say that the district court was clearly wrong in its implicit finding that the county should have expected that Disney would not realize the danger posed by the ramp or that he would fail to protect himself.

Failure to Use Reasonable Care.

Douglas County also argues that it did not breach its duty to use reasonable care to protect Disney from danger. It argues that it acted with reasonable care by providing handrails on either side of the sloping portion of the tile floor.

The following factors are relevant in determining whether Douglas County breached its duty to use reasonable care. These include (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection. *Downey v. Western Comm. College Area*, 282 Neb. 970, ___ N.W.2d ___ (2012). See, also, *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

Ultimately, whether a defendant breaches a duty is a question of fact for the fact finder, and we review it for clear error. *Downey, supra*. See, also, *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

Viewing the evidence in the light most favorable to Disney, we cannot say that the district court clearly erred in its implicit finding that Douglas County failed to use reasonable care to protect Disney from danger. Again, Douglas County employees failed to follow the policies by ensuring that the "wet floor hazard" signs were placed near the top and bottom of the ramp area. Further, the correctional facility employees, knowing that Disney's hands were full of equipment, failed to suggest an alternate route to exit the transfer area.

We conclude that the district court was not clearly wrong in finding that Disney had met his burden of proving the elements of premises liability against Douglas County. This assignment of error is without merit.

Assumption of Risk.

Douglas County argues that the district court should have found in its favor because Disney assumed the risk of injury. The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007). This subjective standard involves an inquiry into what the particular plaintiff in fact sees, knows, understands, and appreciates. *Id.* The doctrine of assumption of risk applies to known dangers and not to those things from which, in possibility, danger may flow. *Id.*

In applying this subjective standard, case law recognizes that a plaintiff's knowledge of a general danger inherent in a particular activity is not enough to establish assumption of risk. *Id.* Rather, the plaintiff must have actual knowledge of the specific danger which caused the injury. *Id.* For example, in *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000), the Nebraska Supreme Court held that the jury should not have been instructed on assumption of risk involving a person who fell from a ladder when it "'flipped, twisted and started to slide'" as he placed shingles on a roof. The plaintiff's admission that he knew that ladders could "'get shaky and fall'" was simply an acknowledgment that he was aware of the general danger involved in using ladders, but did not constitute knowledge of the specific risk that the ladder from which he fell could perform as it did.

The issue in this case is not whether Disney should have known the general dangers of walking on a wet surface, but whether he actually knew, understood, and appreciated the specific danger in this case; that specific danger being the presence of water at the bottom of the ramp. Knowledge in the context of assumption of risk involves a state of mind or mental process which may be proved by circumstantial evidence. *Hughes, supra*.

Disney was able to view the trustees mopping the area; however, they had finished nearly 10 minutes prior to Disney's walking down the ramp. Additionally, there were no wet floor signs set out in the area to warn Disney of the risk involved in walking down the ramp where water was present. From the top of the ramp, Disney did not observe any water on the ramp. It was not until his second, successful trip down the ramp that he was able to observe the water at the bottom of the ramp when he turned around to look more closely at the ramp area. This evidence shows that Disney did not know, understand, or appreciate the specific danger involved in walking down the ramp prior to his first trip down the ramp.

We conclude that the district court was not clearly wrong in failing to find that Disney assumed the risk of walking down the ramp. At best, the evidence is in conflict, and such conflicts in evidence must be resolved in favor of Disney. *Downey v. Western Comm. College Area*, 282 Neb. 970, ___ N.W.2d ___ (2012). This assignment of error is without merit.

Apportionment of Negligence.

We next consider Douglas County's argument that the district court erred in its apportionment of negligence to Disney and Douglas County.

The purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004). Determining apportionment is solely a matter for the fact finder, and its

action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial. *Id.*

Based upon the facts set forth previously and given the deference in our standard of review, we cannot say that the district court's apportionment of negligence between the parties is clearly erroneous.

CONCLUSION

We conclude that the district court did not clearly err in finding Douglas County liable, in failing to find that Disney assumed the risk of his injury, or in apportioning negligence. Accordingly, we affirm.

AFFIRMED.